86-916

APPLICATION FOR WRIT

OF

CERTIORARI

(1)

NUMBER_______________

SUPREME COURT

OF THE

UNITED STATES

JERRY D. CARTER

VS

STATE OF LOUISIANA

FROM

THE SUPREME COURT

STATE OF LOUISIANA

PHILIP ALAN LeTARD
ATTORNEY AT LAW
P. O. BOX 277
VIDALIA LOUISIANA 71373
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ON BEHALF OF DEFENDANT
APPELLANT APPLICANT
JERRY D. CARTER

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED FOR REVIEW

1) Has the prosecution in a criminal case, on a hearing on motion to suppress illegally obtained evidence, met its burden of proof as to alleged consent given to search, when it admits it has other civilian witnesses to the consent but fails to call them to testify, and relies solely upon the testimony of the officer who conducted the complained of search?

2) Is a State-paid and trained probation officer, who is authorized to carry handcuffs and a concealed weapon, make arrests, given a "Miranda" card to read to his arrestees and is trained on arrest procedures, a "state agent" whose authority to search a dwelling is constrained by the Fourth and Fourteenth Amendments to the United States Constitution?

3) When law-enforcement personnel conduct a warrantless search based upon consent, does the prosecution have the burden of showing that the consenting party knew that consent could be denied?

4) In determining consent to a warrantless search by state agents, must a court consider the consenting party's awareness of right to refuse that consent, his or her education, age and intelligence, and his or her belief that no incriminating evidence will be found?

5) Do persons placed upon supervised probation, as opposed to parolees, have the full protection against unreasonable and warrantless searches of their homes guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution?

6) Did the State of Louisiana deny your petitioner, Jerry D. Carter, equal protection of its laws when it allowed a warrantless search of his dwelling by his state probation officer, while petitioner was not at home and such was not in the course of a regularly scheduled visit from his probation officer?

7) Must evidence discovered upon an illegal search by a probation officer,

and which is subsequently used in an affidavit for a search warrant, be excluded from a determination as to whether that warrant was issued upon probable cause?

LIST OF INTERESTED PARTIES

1) State of Louisiana, represented by the District Attorney, 28th Judicial District Court, Dan B. Cornett, Jena, LaSalle Parish, Louisiana.
2) Jerry D. Carter, Defendant.
3) Philip Alan LeTard, Attorney for Jerry D. Carter.

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TABLE OF AUTHORITIES

1) Aquilar v. State of Texas, 84 S.Ct. 1509 378 U.S. 108 (1964)

2) United States v. Kato, 104 S. Ct. 3296 (1984)

3) Steagald v. United States, 101 S. Ct. 1642, 451 U.S. 204 (1981)

4) Payton v. New York, 100 S.Ct. 1371, 445 U.S. 573 (1980)

5) Donovan v. A. A. Beiro Construction Co., 746 F.2d 894 (C.A. D.C. Cir. 1984)

6) United States v. Gomez-Diaz, 712 F.2d 949 (C.A. 5th Cir. 1983), cert. denied at 104 S.Ct. 731

7) Tarter v. Raybuck, 742 F. 2d 977 (C.A. Ohio 1984), cert. denied at 105 S.Ct. 1749

8) Horton v. Goose Creek Independent School District, 690 F.2d 470 (C.A. 5th Cir. 1982)

9) Michigan v. Tyler, 98 S.Ct. 1942, 436 U.S. 499 (1978)

OPINIONS OF COURTS

1) Court of Appeal, Third Circuit, State of Louisiana, March 5, 1986. Affirmed the conviction of the Criminal District Court,Parish, of LaSalle, Louisiana.

2) Court of Appeal, Third Circuit, State of Louisiana, April 9, 1986. Denied Motion for Rehearing.

3) The Supreme Court of the State of Louisiana, September 8, 1986, Applying for Writ of Certiorari and/or Review, Stay, Prohibition and Mandamus. Denied.

GROUNDS FOR JURISDICTION

This Honorable Court has jurisdiction over this petition for writ of certiorari due to the fact that this matter contains the issue of the different expectations of privacy due a probationer as opposed to a parolee. This issue has not been decided by this Court.

Additionally, the Supreme Court of the State of Louisiana has decided several issues relating to warrantless searches and seizures contrary to decisions rendered thereon by the Federal Court of Appeals, Fifth Circuit as well as those rendered by this Supreme Court.

Additionally, there is a conflict as to the law concerning the respective rights of ordinary citizens, parolees and probationers among the Louisiana and Federal Courts of Appeal.

Additionally, this issue presents a new question that has not been decided by this Honorable Court.

PERTINENT RULES, LAWS, REGULATIONS AND CONSTITUTIONAL PROVISIONS HEREIN:

1) The 4th and 14th Amendments to the United States Constitution, prohibiting unreasonable searches and seizures;

2) La. C.Cr.P. Article 703 (See Appendix A).

3) La. C.Cr.P. Article 521 (See Appendix B).

4) La. C.Cr.P. Articles 161 and 162 (See Appendix C).

5) La. C.Cr.P. Article 893 (See Appendix D).

6) La. C.Cr.P. Article 894.1 (See Appendix E).

7) La. C.Cr.P. Article 895 (See Appendix F).

8) La. R.S. 15:571.5 - R.S. 15:571.7 (See Appendix G).

9) La. R.S. 15:571.13 (See Appendix H).

10) La. R.S. 15:571.21 (See Appendix I).

11) La. R.S. 15:574.2 - 15:574.8 (See Appendix J).

12) Louisiana Constitution of 1974, Article I (See Appendix K).

STATEMENT OF THE CASE

The uncontested facts of the case can be found in transcript of the record of the hearing held on defendant's motion to suppress, held on March 6, 1985.

Your petitioner, Jerry D. Carter, had been convicted of possession of marijuana with intent to distribute, and had been placed on supervised probation for a period of three (3) years.

In early January, 1984, Mr. Carter received his first visit from his probation officer, Mr. Gary Whatley. Several weeks later, on January 30, 1984, Mr. Whatley was in Tullos, Louisiana on a routine visit to another of his probationers, when the Tullos Police Chief approached him. The Chief informed Mr. Whatley that a reliable informant had informed him (the Chief) that petitioner was growing marijuana inside of his mobile home. The Chief asked Officer Whatley to go and speak to petitioner.

Arriving at petitioner's home at

approximately 2:30 p.m., on an unscheduled visit, Officer Whatley was greeted at the foor by petitioner's ex-wife, and present roommate, Ms. McClure, who was only seventeen (17) years of age. When asked as to when petitioner would be back home, Ms. McClure responded with "later this evening". Officer Whatley asked if he could enter and wait. Inside the living-room area were two (2) other guests. Officer Whatley, who is a paid employee of the State of Louisiana, authorized to make arrests, carry concealed weapons, and handcuffs, issued a "Miranda Warnings" card and trained in arrest procedures, sat inside the den area making small talk for about fifteen (15) minutes.

At this point, the facts become contested. According to Officer Whatley's own testimony, he asked for, and was granted, permission to search the home by Ms. McClure, and in the presence of the other two (2) guests in the home. Ms. McClure denied his asking permission to search, and testified that Officer Whatley simply began the search on his own

initiative.

A search of the closed bedroom and a closed closet revealed marijuana plants and several firearms. Not until approximately 4:00, while nearing his home, was petitioner, Jerry Carter, arrested. Then, based solely upon Officer Whatley's observations during his search of petitioner's home, a search warrant was then issued by a State District Court Judge. Despite the fact that Officer Whatley's visit to petitioner's home was far from routine, the affidavit, for the search warrant, swore that the illegal items were discovered during Whatley's "routine visit" to his probationer's home.

Counsel for petitioner timely filed a motion to suppress the evidence seized from petitioner's home, with hearing on said motion having been had on March 6, 1985. The trial court denied petitioner's motion on the ground that Louisiana Code of Criminal Procedure Article 895(A) (4) obligated petitioner, as a probationer, to

allow routine inspections of his home as a condition of his probation. On March 11, 1985, petitioner withdrew his plea of not guilty and pled guilty. He did, however, and as allowed by Louisiana law, reserve his right to appeal the denial of his motion to suppress. Pre-sentencing investigation was conducted on April 29, 1985, and petitioner, Jerry Carter, was sentenced to three (3) years at hard labor.

Despite the prosecution's own testimony alleging that two (2) witnesses were present when Ms. McClure was asked for permission to and then consented to the search of petitioner's home by Officer Whatley, the State failed to call those witnesses at the motion to suppress.

The Louisiana Court of Appeal, Third Circuit, held that there was valid consent given for the search. From that adverse decision affirming the trial court, petitioner timely petitioned for writs of certiorari, mandamus and prohibition from the Louisiana Supreme Court. Writs were denied on September 8, 1986.

JUDGMENT FROM WHICH REVIEW IS SOUGHT

Petitioner seeks review of that judgment rendered against him by the Supreme Court, State of Louisiana on September 8, 1986, wherein petitioner's application for writs of certiorari, review, prohibition and mandamus was denied. (See Appendix L)

ARGUMENT AND LAW

I. A Warrantless Search of One's Home, Absent One of the Specific Exceptions Pronounced by the United States Supreme Court, Is Violative of the Fourth and Fourteenth Amendments to the United States Constitution.

General Principles

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Those same standards applicable under the Fourth Amendment have been held to equally apply to the States under the provisions of the Fourteenth Amendment to the United States Constitution. Aquilar v. State of Texas, 84 S. Ct. 1509, 378 U.S. 108 (1964), overruled on other grounds. This Honorable Supreme Court has pronounced several legal principles to govern the "reasonableness" of a search

and seizure, which must be discussed as a starting-point herein.

First, warrantless searches are presumptively unreasonable, and violative of the Fourth and Fourteenth Amendments to the United States Constitution. United States v. Kato, 104 S. Ct. 3296 (1984), rehearing denied at 105 S. Ct. 2066. Second, it is axiomatic that "a man's home is his castle", and is entitled to the strongest protections of the United States Constitution. Steagald v. United States, 101 S. Ct. 1642, 451 U.S. 204 (1981) and Payton v. New York, 100 S. Ct. 1371, 445 U.S. 573 (1980).

Additionally, the only exception to the prohibition against warrantless searches and seizures at issue in the case-at-bar is that of consent. When the State alleges that it had consent to make warrantless seach of one's dwelling, it has the burden of proving that consent was feely, knowingly and voluntarily given. Donovan v. A. A. Beiro Construction Co., 746 F.2d

894 (C.A. D.C. Cir. 1984) and United States v. Gomez-Diaz, 712 F.2d 949 (C.A. 5th Cir. 1983), cert. denied at 104 S.Ct. 731.

Lastly, all agents of the State, especially the probation officer herein, are constrained by the Constitutional prohibitions against unreasonable and warrantless searches and seizures. In Tarter v. Raybuck, 742 F.2d 977 (C.A. Ohio 1984), cert. denied at 105 S.Ct. 1749, and Horton v. Goose Creek Independent School District, 690 F.2d 470 (C.A. 5th Cir. 1982), those respective courts held that state-paid school officials conducting warrantless searches and seizures were "state agents" for the purposes of the Fourth and Fourteenth Amendments to the United States Constitution. Firemen have also been held, by this Court, to be Constitutionally restrained from unreasonable and warrantless searches and seizures. Michigan v. Tyler, 98 S.Ct. 1942, 436 U.S. 499 (1978).

The State's Burden of Proof as to Consent

There is no argument that the initial search of petitioner's home was conducted

without a warrant. It is as equally clear that the only exception to the warrant requirement, presented by the State of Louisiana, was that its probation officer had petitioner's girfriend's consent to search their jointly occupied home. At the hearing on petitioner's motion to suppress, the State's probation officer testified that there were two (2) additional individuals present when he requested and was granted consent to search petitioners dwelling. Despite the availability of these corroborating witnesses, and the burden of proof being upon it, the State of Louisiana failed to even call those witnesses to petitioner's hearing. Instead, the State relied upon the head-to-head contradicted testimony of its probation officer to establish consent by petitioner's girlfriend.

Similar to the evidentiary rule that where a tort-plaintiff fails to call upon his treating physician's testimony to corroborate his claims of injury, that physi-

cian's testimony will then be presumed to be adverse to the plaintiff, it is suggested that the United States Constitution requires a similar rule herein. This Court should hold that when the prosecution fails to put forth evidence or testimony, which it admits to have available and which would corroborate its allegation of consent, such should be held to be adverse to the State.

At the very least, the State's failure to corroborate the probation officer's testimony that he was given permission to search petitioner's home, when it admitted to having such corroboration, shows that the courts below erred in finding that the State met its burden of proving consent.

NOTES

1) For writ of habeas corpus, we could argue that denial of Mr. Carter's full right to protection against illegal searches and seizures denies him equal protection of federal and state laws.

The discriminated class would be that of Louisiana probationers. Thus far, the

U. S. Supreme Court has not held probationers to be the same class as parolees. Cite and note the differences between the La. C.Cr.P.'s restrictions on probationers contrasted with those placed upon parolees under Title 15.

Respectfully submitted,

PHILIP ALAN LeTARD
ATTORNEY AT LAW
P. O. BOX 277
VIDALIA, LOUISIANA 71373
(318 336-5014)

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleadings have been served upon counsel for all parties by sending it by First Class United States Mail properly addressed and postage prepaid on the 7 day of November, 1986.

PHILIP ALAN LeTARD

STATEMENT OF MAILING

I, PHILIP A. LeTARD, hereby certify that, on the 7th day of November, 1986, I served copies of the foregoing Petition by personally placing same in a sealed envleope first class postage thereon fully prepaid in United States Post Office mail box in Vidalia, Louisiana, to each of the parties thereto, as follows:

1. To the Clerk of the Supreme Court of the United States, 1 First Street, N.E., Washington, D. C., 20543, enclosing established filing fee,

2. Dan B. Cornett, District Attorney, 28th Judicial District, Jena, LaSalle Parish, Louisiana.

IT IS FURTHER certified that all parties required to be served have been served, and that the list of such parties is as set forth above.

Philip Alan LeTard

PHILIP ALAN LeTARD

APPENDIX

Appendix "A"	La. C.Cr.P. Article 703.
Appendix "B"	La. C.Cr.P. Article 521.
Appendix "C"	La. C.Cr.P. Articles 161 and 162.
Appendix "D"	La. C.Cr.P. Article 893.
Appendix "E"	La. C.Cr.P. Article 894.1.
Appendix "F"	La. C.Cr.P. Article 895.
Appendix "G"	La. R.S. 15:571.5 - R.S. 15:571.7
Appendix "H"	La. R. S. 15:571.13.
Appendix "I"	La. R. S. 15:571.21.
Appendix "J"	La. R. S. 15:574.2. - R.S.15:574.8
Appendix "K"	Louisiana Constitution of 1974.
Appendix "L"	September 8, 1986, Supreme Court ruling, State of Louisiana v. Jerry D. Carter

I certify that all of the appendices attached to the petition for Certiorari filed herein are true copies of what they purport to be.

Philip Alan LeTard

PHILIP ALAN LeTARD

APPENDIX "A"

CHAPTER 2. MOTION TO SUPPRESS EVIDENCE

Art. 703. Motion to suppress evidence

A. A defendant adversely affected may move to suppress any evidence from use at the trial on the merits on the ground that it was unconstitutionally obtained.

B. A defendant may move on any constitutional ground to suppress a confession or statement of any nature made by the defendant.

C. A motion filed under the provisions of this Article must be filed in accordance with Article 521, unless opportunity therefor did not exist or neither the defendant nor his counsel was aware of the existence of the evidence or the ground of the motion, or unless the failure to file the motion was otherwise excusable. The court in its discretion may permit the filing of a motion to suppress at any time before or during the trial.

D. On the trial of a motion to suppress filed under the provisions of this Article, the burden of proof is on the defendant to prove the ground of his motion, except that the state shall have the burden of proving the admissibility of a purported confession or statement by the defendant or of any evidence seized without a warrant.

E. An evidentiary hearing on a motion to suppress shall be held only when the defendant alleges facts that would require the granting of relief. The state may file an answer to the motion. The defendant may testify in support of a motion to suppress without being subject to examination on other matters. The defendant's testimony cannot be used by the state except for the purpose of impeaching the defendant's testimony at the trial on the merits.

If the defendant testifies before the jury at the trial on the merits, he can be cross-examined on the whole case.

F. A ruling prior to trial on the merits, upon a motion to suppress, is binding at the trial. Failure to file a motion to suppress evidence in accordance with this Article prevents the defendant from objecting to its admissibility at the trial on the merits on a ground assertable by a motion to suppress.

G. When a ruling on a motion to suppress a confession or statement is adverse to the defendant, the state shall be required,

prior to presenting the confession or statement to the jury, to introduce evidence concerning the circumstances surrounding the making of the confession or statement for the purpose of enabling the jury to determine the weight to be given the confession or statement.

A ruling made adversely to the defendant prior to trial upon a motion to suppress a confession or statement does not prevent the defendant from introducing evidence during the trial concerning the circumstances surrounding the making of the confession or statement for the purpose of enabling the jury to determine the weight to be given the confession or statement.

Amended by Acts 1975, No. 814, § 1; Acts 1978, No. 746, § 1; Acts 1980, No. 431, § 1.

APPENDIX "B"

TITLE XIV-A. PRETRIAL MOTIONS

Art. 521. Time for filing of pretrial motions

Pretrial motions shall be made or filed within fifteen days after arraignment, unless a different time is provided by law or fixed by the court at arraignment upon a showing of good cause why fifteen days is inadequate.

Upon written motion at any time and a showing of good cause, the court shall allow additional time to file pretrial motions.

Added by Acts 1978, No. 735, § 1. Amended by Acts 1981, No. 440, § 1.

1981 Amendment: In the first sentence, substituted "fifteen days" for "thirty days", added a comma following "arraignment", and added "upon a showing of good cause why fifteen days is inadequate".

APPENDIX "C"

in China. No crime had been committed on the premises where the search took place and there was no arrest of anyone on the premises. Federal agents searched the premises for nearly four hours, going into file cabinets and book cases. The circuit court of appeals found that there had been an unreasonable general search of premises for something not described in the search warrant, and that letters found in the search mentioning herbs and medicines were, therefore, not admissible.

This Title is designed to provide law enforcement officers and courts the necessary guide-lines in this important field. Although an effort has been made to comply with previous pronouncements of the United States Supreme Court, which are at best somewhat uncertain, no attempt has been made to foresee or to anticipate future decisions by the court.

The procedure for the motion to suppress evidence on the ground that it was unconstitutionally obtained is contained in Art. 703 in Title XXIV, Procedures Prior to Trial.

Art. 162. Issuance of warrant; affidavit; description

A search warrant may issue only upon probable cause established to the satisfaction of the judge, by the affidavit of a credible person, reciting facts establishing the cause for issuance of the warrant.

A search warrant shall particularly describe the person or place to be searched, the persons or things to be seized, and the lawful purpose or reason for the search or seizure.

Amended by Acts 1974, Ex.Sess. No. 15, § 1, eff. Jan. 1, 1975.

APPENDIX "D"

Art. 893. Suspension of sentence and probation in felony cases

A. When it appears that the best interest of the public and of the defendant will be served, the court, after conviction of a felony for which the punishment is with or without hard labor or a felony which is a violation of the Controlled Dangerous Substances Law[1] of Louisiana, noncapital felony, may suspend for the first conviction only the imposition or execution of any sentence, where suspension is allowed under the law and in either case place the defendant on probation under the supervision of the division of probation and parole supervision. The period of probation shall be specified and shall not be less than one year nor more than five years. The suspended sentence shall be regarded as a sentence for the purpose of granting or denying a new trial or appeal.

B. The court under the same conditions and by the same procedure as provided for above may suspend the execution or imposition of the sentence of a multiple offender who has been convicted, in the instant offense, of a violation of the Controlled Dangerous Substances Law of Louisiana, other than the production, manufacture, distribution, or dispensing, or possession with intent to produce, manufacture, distribute or dispense, or the attempt to produce, manufacture, distribute or dispense, or the attempt to possess with intent to produce, manufacture, distribute, or dispense, a controlled dangerous substance, and place the defendant on probation if he intends to participate in the program authorized by the Federal Narcotics Rehabilitation Act or other federal or state rehabilitation programs; however, if for any reason the defendant is rejected by said program, he shall be returned to the custody of the court which imposed the sentence and the sentencing judge shall order the sentence executed.

C. If the sentence consists of both a fine and imprisonment, the court may impose the fine and suspend the sentence or place the defendant on probation as to the imprisonment.

D. The court shall not suspend a felony sentence after the defendant has begun to serve the sentence.

E. When the imposition of sentence has been suspended by the court, as authorized by this Article, and the court finds at the conclusion of the probationary period that the probation of the defendant has been satisfactory, the court may set the conviction aside and dismiss the prosecution and the dismissal of the prosecution shall have the same effect as acquittal, except that said conviction may be considered as a first offense and provide the basis for subsequent prosecution of the party as a multiple offender, and further shall be considered as a first offense for purposes of any other law or laws relating to cumulation of offenses.

F. Nothing contained herein shall be construed as being a basis for destruction of records of the arrest and prosecution of any person convicted of a felony.

APPENDIX "E"

Art. 894.1. Sentence guidelines; generally

A. When a defendant has been convicted of a felony or misdemeanor, the court should impose a sentence of imprisonment if:

(1) There is an undue risk that during the period of a suspended sentence or probation the defendant will commit another crime;

(2) The defendant is in need of correctional treatment or a custodial environment that can be provided most effectively by his commitment to an institution; or

(3) A lesser sentence will deprecate the seriousness of the defendant's crime.

B. The following grounds, while not controlling the discretion of the court, shall be accorded weight in its determination of suspension of sentence or probation:

(1) The defendant's criminal conduct neither caused nor threatened serious harm;

(2) The defendant did not contemplate that his criminal conduct would cause or threaten serious harm;

(3) The defendant acted under strong provocation;

(4) There was substantial grounds tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense;

(5) The victim of the defendant's criminal conduct induced or facilitated its commission;

(6) The defendant has compensated or will compensate the victim of his criminal conduct for the damage or injury that he sustained;

(7) The defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the instant crime;

(8) The defendant's criminal conduct was the result of circumstances unlikely to recur;

(9) The character and attitudes of the defendant indicate that he is unlikely to commit another crime;

(10) The defendant is particularly likely to respond affirmatively to probationary treatment; and

(11) The imprisonment of the defendant would entail excessive hardship to himself or his dependents.

C. The court shall state for the record the considerations taken into account and the factual basis therefor in imposing sentence.

Added by Acts 1977, No. 635, § 1.

Art. 895. Conditions of probation

A. When the court suspends the imposition or execution of sentence and places a defendant on probation, it shall require the defendant to refrain from criminal conduct and it may impose any specific conditions reasonably related to his rehabilitation, including any of the following:

That the defendant shall:

(1) Make a full and truthful report at the end of each month;

(2) Meet his specified family responsibilities;

(3) Report to the probation officer as directed;

(4) Permit the probation officer to visit him at his home or elsewhere;

(5) Devote himself to an approved employment or occupation;

(6) Refrain from owning or possessing firearms or other dangerous weapons;

(7) Make reasonable reparation or restitution to the aggrieved party for damage or loss caused by his offense in an amount to be determined by the court;

(8) Refrain from frequenting unlawful or disreputable places or consorting with disreputable persons; or

(9) Remain within the jurisdiction of the court and get the permission of the probation officer before any change in his address or his employment.

B. In felony cases, an additional condition of the probation may be that the defendant shall serve a term of imprisonment without hard labor for a period not to exceed two years.

C. The defendant shall be given a certificate setting forth the conditions of his probation and shall be required to agree in writing to the conditions.

Amended by Acts 1972, No. 711, § 1; Acts 1974, No. 211, § 1; Acts 1982, No. 27, § 1.

571.5. Supervision upon release after diminution of sentence for good behavior; conditions of release; revocation

A. When a prisoner committed to the Department of Corrections is released because f diminution of sentence pursuant to this Part, he shall be released as if released on arole.

At least three months prior to the anticipated release due to diminution of sentence, the ecretary of the Department of Corrections shall notify the parole board and provide such formation as is necessary to allow the board to establish such conditions as provided in .S. 15:574.4(H) as may be reasonably necessary to facilitate supervision.

B. The person released because of diminution of sentence pursuant to this Part shall e supervised in the same manner and to the same extent as if he were released on arole.

The supervision shall be for the remainder[1] of the original full term of sentence.

If a person released because of diminution of sentence pursuant to this Part violates a ondition imposed by the parole board, the board shall proceed in the same manner as it ould to revoke parole to determine if the release upon diminution of sentence should be evoked.

C. Upon revocation of the person's release upon diminution of sentence by the parole oard, the person shall be recommitted to the Department of Corrections for the emainder of the original full term. No further diminution of sentence for good behavior hall be allowed.

dded by Acts 1981, No. 762, § 1, eff. July 1, 1982.

571.7. Supervision upon release from parish prison after diminution of sentence for good behavior; conditions of release; revocation

A. When a prisoner who has been sentenced to a parish prison in a parish having a pulation in excess of five hundred thousand people is released because of diminution of ntence pursuant to this Part, he shall be released as if released on parole.

B. A prisoner released in accordance with Subsection A herein shall be supervised by e sheriff, the keeper of the parish prison if not the sheriff, or, in Orleans Parish, the minal sheriff of Orleans Parish. Such supervision shall be for the remainder of the ginal full term of the prisoner's sentence and shall be performed in the same manner d to the same extent as supervision of a prisoner committed to the Department of rrections who is released on parole.

C. The supervisor may make rules for the conduct of a prisoner while he is on release and may also require, either at the time of release or at any time while on release, that the prisoner conform to any of the following conditions:

(1) Residence in a community rehabilitation center.

(2) Restitution to a victim of the crime for which release is being sought, if such victim has suffered a direct pecuniary loss as a result of the crime. The supervisor shall take into account the prisoner's ability to pay and shall not revoke release based upon this condition unless the prisoner has willfully failed to comply.

(3) Community service work, as determined by the supervisor.

(4) Payment into a victim compensation fund, if such fund is established, in a manner and amount specified by law.

(5) Obtaining gainful employment.

(6). Continuing education or vocational training.

(7) Participation in a substance abuse treatment facility program or other counselling program.

(8) Any other condition which may presently be applied under R.S. 15:574.4(H) to a prisoner committed to the Department of Corrections who is released on parole.

D. A prisoner released in accordance with this Section shall be subject to having the release revoked for violation of the release conditions. The supervisor shall establish rules and regulations governing the revocation of release.

E. Upon revocation of release, the prisoner shall be recommitted to the parish prison and shall serve the remaining full term of his sentence.

Added by Acts 1982, No. 574, § 1.

§ 571.13. Supervised release of parish prisoners; rules of conduct; revocation

A. When a prisoner who has been sentenced to a parish prison is released pursuant to this Part, he may be released as if on parole.

B. A prisoner released in accordance with Subsection A herein shall be supervised by the sheriff, the keeper of the parish prison if not the sheriff, or, in Orleans Parish, the criminal sheriff of Orleans Parish. Such supervision shall be for the remainder of the original full term of the prisoner's sentence and shall be performed in the same manner and to the same extent as supervision of a prisoner committed to the Department of Public Safety and Corrections who is released on parole.

C. The supervisor may make rules for the conduct of a prisoner while he is on release and may also require, either at the time of release or at any time while on release, that the prisoner conform to the following conditions:

(1) Residence in a community rehabilitation or work release center.

(2) Restitution to a victim of the crime for which release is being sought, if such victim has suffered a direct pecuniary loss as a result of the crime.

(3) Community service work, as determined by the supervisor.

(4) Payment into a victim compensation or service fund.

(5) Obtaining gainful employment.

(6) Continuing education or vocational training.

(7) Participation in a substance abuse treatment facility program or other counselling program.

(8) Defraying the cost, or any portion thereof, of his supervision by making payments to the supervisor in a sum and manner to be determined by the supervisor, based on his ability to pay.

(9) Any other condition which may be applied under R.S. 15:574.4(H) to a prisoner committed to the Department of Public Safety and Corrections who is released on parole.

D. A prisoner released in accordance with this Section shall be subject to having the release revoked for violation of the release conditions. The supervisor shall establish rules and regulations governing the revocation of release.

E. Upon revocation of release, the prisoner shall be recommitted to the parish prison in order to serve the full term of his sentence.

Added by Acts 1985, No. 712, § 1.

§ 571.21. Probation and Parole Management Fund

A. All probation supervision fees received by the department pursuant to Code of Criminal Procedure Art. 895.1(C) shall be deposited immediately upon receipt into the state treasury.

B. After compliance with the requirements of Article VII, Section 9(B) of the Constitution of Louisiana relative to the Bond Security and Redemption Fund, and prior to monies being placed in the state general fund, an amount equal to that deposited as required by Subsection A shall be credited to a special fund hereby created in the state treasury designated as the Probation and Parole Management Fund. The monies in this fund shall be used solely as provided by Subsection C and only in the amounts which shall be appropriated annually by the legislature. All unexpended and unencumbered monies in this fund at the end of the fiscal year shall remain in such fund. The monies in this fund shall be invested by the state treasurer in the same manner as monies in the state general fund, and interest earned on the investment of these monies shall be credited to this fund also in compliance with the requirement of Article VII, Section 9(B), relative to the Bond Security and Redemption Fund.

C. The monies in the Probation and Parole Management Fund shall be used solely by the department for salaries and any other category of expenditures deemed necessary by the secretary of the department for maintaining the limit on the number of work units assigned to each probation and parole specialist.

D. The monies in the Probation and Parole Management Fund shall not exceed three million dollars and any monies received in excess of that amount shall be paid into the state general fund.

Added by Acts 1985, No. 383, § 1, eff. July 10, 1985.

§ 574.2. Board of parole; membership; qualifications; vacancies; compensation; domicile; meetings; quorum; powers and duties; transfer of property to board; representation of applicants before the board; prohibitions

Text of Subsection A as amended by Acts 1980, No. 733, § 1, eff. July 29, 1980, and paragraphs (1) and (2) of Subsection A as further amended by Acts 1982, No. 508, § 1.

A. (1) A Board of Parole, hereinafter referred to as "the board," is hereby created in the Department of Corrections. It shall consist of five members appointed by the governor, one of whom shall be the chairman of the board, and all of whom shall serve at the pleasure of the governor. Each appointment by the governor shall be submitted to the Senate for confirmation; and beginning in 1984, every appointment confirmed by the Senate shall again be submitted by the governor to the Senate for confirmation every two years after the initial confirmation.

(2) Each member shall devote full time to the duties of his office and shall not engage in any other business or profession or hold any other public office.

Amended by Acts 1982, No. 508, § 1.

(3) The chairman of the board shall receive an annual salary of twenty-five thousand dollars and each of the other members of the board shall receive an annual salary of twenty-three thousand dollars; payable on his own warrant, and shall be reimbursed for necessary travel and other expenses actually incurred in the discharge of his duties.

For text of Subsection A as amended by Acts 1980, No. 448, § 1, see Main Volume.

B. The domicile of the board shall be in the parish of East Baton Rouge, city of Baton Rouge, Louisiana. The board shall meet at the adult correctional institutions on regular scheduled dates, not less than every three months. Such dates are to be determined by the chairman. Three votes are required to grant parole. A majority of those present and voting is required to revoke parole.

Amended by Acts 1981, No. 447, § 1.

C. In accordance with the provisions of this Part the board of parole shall have the following powers and duties:

(1) To determine the time and conditions of release on parole of any person who has been convicted of a felony and sentenced to imprisonment, and confined in any penal or correctional institution in this state;

(2) To determine and impose sanctions for violation of the conditions of parole;

(3) To keep a record of its acts and to notify each institution of its decisions relating to the persons who are or have been confined therein;

(4) To transmit annually, on or before the first day of February, a report to the director of institutions, for inclusion in his report to the governor, which report shall include statistical and other data with respect to the determinations and work of the board for the preceding calendar year, research studies which the board may make of sentencing, parole or related functions, and may include a recommendation of legislation to further improve the parole system of this state;

(5) To apply to a district court to issue subpoenas, compel the attendance of witnesses, and the production of books, papers and other documents pertinent to the subject of its inquiry; to take testimony under oath, either at a hearing or by deposition; and to pay all costs in connection with the board hearings;

(6) To consider all pertinent information with respect to each prisoner who is incarcerated in any penal or correctional institution in this state at least one month prior to the parole eligible date and thereafter at such other intervals as it may determine, which information shall be a part of the inmate consolidated summary record and which shall include the circumstances of his offense, the reports filed under Articles 875 and 876 of the Louisiana Code of Criminal Procedure, his previous social history and criminal record, his conduct, employment and attitude in prison and any reports of physical and mental examinations which have been made.

(7) To adopt such rules not inconsistent with law as it deems necessary and proper, with respect to the eligibility of prisoners for parole, the conduct of parole hearings of conditions imposed upon parolees.

(8) When requested to notify the chief of police, where such exists, the sheriff and district attorney of the parish where the individual resides and the conviction occurred. Said notification shall be in writing and shall be issued at least seven days prior to the release of any parolees residing within the jurisdiction of the agency.

(9) To notify the spouse or next of kin of a deceased victim when the offender responsible for the death is scheduled for a parole hearing, unless the spouse or next of kin advises the board in writing that such notification is not desired.

Added by Acts 1985, No. 140, § 1.

§ 574.4. **Parole; eligibility for consideration; consideration and hearings; decisions of board; nature of parole; order of parole; conditions of parole; rules of conduct**

A. A person, otherwise eligible for parole, convicted of a first felony offense and committed to the Department of Corrections shall be eligible for parole consideration upon serving one-third of the sentence imposed; upon conviction of a second felony offense, such person shall be eligible for parole consideration upon serving one-half of the sentence imposed. A person convicted of a third or subsequent felony and committed to the Department of Corrections shall not be eligible for parole.

B. No person shall be eligible for parole consideration who has been convicted of armed robbery and denied parole eligibility under the provisions of R.S. 14:64, or who has been convicted of violation of the Uniform Narcotic Drug Law and denied parole eligibility under the provisions of R.S. 40:981. No prisoner serving a life sentence shall be eligible for parole consideration until his life sentence has been commuted to a fixed term of years. No prisoner may be paroled while there is pending against him any indictment or information for any crime suspected of having been committed by him while a prisoner.

C. At such intervals as it determines, the board or a member thereof shall consider all pertinent information with respect to each prisoner eligible for parole, including the nature and circumstances of the prisoner's offense, his prison records, the pre-sentence investigation report, any recommendations of the chief probation and parole officer, and any information, reports of data supplied by the staff. A parole hearing shall be held if, after such consideration, the board determines that a parole hearing is appropriate or if such hearing is requested in writing by its staff.

D. The parole hearings shall be conducted in a formal manner in accordance with the rules formulated by the board and with the provisions of this Part. Before the parole of any prisoner is ordered, such prisoner shall appear before and be interviewed by the board, except those incarcerated in parish prisons or parish correctional centers, in which case one board member may conduct the interview. The board may order a reconsideration of the case or a rehearing at any time.

E. The board shall render its decision ordering or denying the release of the prisoner on parole within thirty days after the hearing. A parole shall be ordered only for the best interest of society, not as an award of clemency, and upon determination by the board that there is reasonable probability that the prisoner is able and willing to fulfill the obligations of a law-abiding citizen so that he can be released without detriment to the community or to himself.

F. All paroles shall issue upon order of the board and each order of parole shall recite the conditions thereof; provided, however, that before any prisoner is released on parole he shall be provided with a certificate of parole that enumerates the conditions of parole. These conditions shall be explained to the prisoner and the prisoner shall agree in writing to such conditions.

G. The release date of the prisoner shall be fixed by the board, but such date shall not be later than six months after the parole hearing or the most recent reconsideration of the prisoner's case.

H. The Board of Parole may make rules for the conduct of persons heretofore or hereafter granted parole. When a prisoner is released on parole, the board shall require as a condition of his parole that he refrain from engaging in criminal conduct. The board may also require, either at the time of his release on parole or at any time while he remains on parole, that he conform to any of the following conditions of parole which are appropriate to the circumstances of the particular case:

(1) Report immediately to the division of probation and parole office, Department of Corrections, which is listed on the face of the certificate of parole.

(2) Remain within the limits fixed by the certificate of parole. If he has good cause to leave these limits, he will obtain written permission from the parole officer and the approval of the division of probation and parole before doing so.

(3) Between the first and fifth days of each month, until his final release, and also on the final day of his parole, make a full and truthful written report upon the form provided for that purpose and that he will take or mail his report to his parole officer. He will report to the probation and parole officer when directed to do so.

(4) Avoid injurious or vicious habits and places of disreputable or harmful character.

(5) Will not associate with persons known to be engaged in criminal activities or with persons known to have been convicted of a felony, without written permission of his parole officer.

(6) In all respects conduct himself honorably, work diligently at a lawful occupation, and support his dependents, if any, to the best of his ability.

(7) Promptly and truthfully answer all inquiries directed to him by the probation and parole officer.

(8) Live and remain at liberty and refrain from engaging in any type of criminal conduct.

(9) Live and work at the places stated in his parole plan and not change residence or employment until after he has permission to do so from his parole officer.

(10) Shall not have in his possession or control any firearms or dangerous weapons.

(11) Submit himself to available medical or psychiatric examination or treatment or both when ordered to do so by the probation and parole officer.

(12) Waive extradition to the state of Louisiana from any jurisdiction in or outside the United States where he may be found and also agree that he will not contest any effort by any jurisdiction to return him to the state of Louisiana.

(13) Will be subject to visits by his parole officer at his home or place of employment without prior notice.

(14) Such other specific conditions as are appropriate, stated directly and without ambiguity so as to be understandable to a reasonable man.

(15) Defray the cost, or any portion thereof, of his parole supervision by making payments to the Board of Parole in a sum and manner determined by the board, based upon his ability to pay.

Amended by Acts 1981, No. 294, § 1; Acts 1981, No. 448, § 1.

I. At the time these written conditions are given, the board shall notify the parolee that:

(1) If he is arrested while on parole, the board has the authority to place a detainer against him which will in effect prevent him from making bail pending any new charges against him; and

(2) Should his parole be revoked for any reason, good time earned prior to parole will be forfeited, as required by R.S. [illegible]4.

J. (1) When a victim of the crime for which parole is being considered has suffered a direct pecuniary loss other than damage to or loss of property, the parole board may impose as a condition of parole that restitutions to the victim be made. When such a condition is imposed, the board shall take into account the defendant's ability to pay and shall not revoke parole based upon this condition unless the parolee has willfully failed to comply. When the victim's loss consists of damage to or loss of property, the board shall impose as a condition of parole payment of restitution, either in a lump sum or in monthly installments based on the earning capacity and assets of the defendant. If the victim was paid for such property loss or damage with monies from the Crime Victims Reparations Fund, the board shall order the parolee to make such payments as reimbursement to the fund in the same amount as was paid from the fund to the victim. This condition of parole shall continue until such time as the restitution is paid or the parolee is discharged from parole in accordance with R.S. 15:574.6.

§ 574.6. Parole term; automatic discharge

The parole term, when the board orders a prisoner released on parole, shall be for the remainder of the prisoner's sentence, without any diminution of sentence for good behavior. When the parolee has completed his full parole term, he shall be discharged from parole and shall be issued a final order of discharge by the board. A copy of this order shall be sent to the Department of Corrections to be made a matter of permanent record.

§ 574.7. Custody and supervision of parolees; modification or suspension of supervision, violation of conditions of parole; sanctions

A. Each parolee shall remain in the legal custody of the institution from which he was paroled, but shall be subject to the orders and supervision of the board. At the direction of the board, the chief probation and parole officer shall be responsible for the investigation and supervision of all parolees. The board may modify or suspend such supervision upon a determination that a parolee who had conducted himself in accordance with the conditions of his parole no longer needs the guidance and supervision originally imposed.

B. If the chief probation and parole officer, upon recommendation by a parole officer, has reasonable cause to believe that a parolee has violated the conditions of parole, he shall notify the board, and shall cause the appropriate parole officer to submit the parolee's record to the board. After consideration of the record submitted, and after such further investigation as it may deem necessary, the board may order:

(1) The issuance of a reprimand and warning to the parolee;

(2) That the parolee be required to conform to one or more additional conditions of parole which may be imposed in accordance with R.S. 15:574.4;

(3) That the parolee be arrested, and upon arrest be given a prerevocation hearing within a reasonable time, at or reasonably near the place of the alleged parole violation or arrest, to determine whether there is probable cause to detain the parolee pending orders of the parole board.

Upon receiving a summary of the prerevocation proceeding, the board may order the parolee's return to the institution from which he was paroled to await a hearing to determine whether his parole should be revoked.

§ 574.8. Parole officers; powers of arrest; summary arrest and detention of parolees

A. Incidental to the supervision of parolees, parole officers shall be deemed to be peace officers and shall have the same powers with respect to criminal matters and the enforcement of the law relating thereto as sheriffs, constables and police officers have in their respective jurisdictions. They have all the immunities and matters of defense now available or hereafter made available to sheriffs, constables and police officers in any suit brought against them in consequence of acts done in the course of their employment.

B. If a parole officer has reasonable cause to believe that a parolee has violated or is attempting to violate a condition of his parole and that an emergency exists, so that awaiting action by the board under R.S. 15:574.7 would create an undue risk to the public or to the parolee, such parole officer may arrest the parolee without a warrant, or may authorize any peace officer to do so. The authorization may be in writing or oral, but if not written, shall be subsequently confirmed by a written statement. The written authorization or subsequent confirmation shall set forth that, in the judgment of the parole officer, the person to be arrested has violated or was attempting to violate a condition of his parole. The parolee arrested hereunder shall be detained in a local jail or other detention facility, pending action by the board. Immediately after such arrest and detention, the parole officer concerned shall notify the chief probation and parole officer and submit a written report of the reason for the arrest. After consideration of the written report, the chief probation and parole officer shall, with all practicable speed, make a preliminary determination, and shall either order the parolee's release from detention or proceed promptly in accordance with R.S. 15:574.7.

Acts 1968, No. 191, § 1.

APPENDIX "K"

ARTICLE I. DECLARATION OF RIGHTS

§ 1. Origin and Purpose of Government

Section 1. All government, of right, originates with the people, is founded on their will alone, and is instituted to protect the rights of the individual and for the good of the whole. Its only legitimate ends are to secure justice for all, preserve peace, protect the rights, and promote the happiness and general welfare of the people. The rights enumerated in this Article are inalienable by the state and shall be perserved inviolate by the state.

§ 2. Due Process of Law

Section 2. No person shall be deprived of life, liberty, or property, except by due process of law.

§ 3. Right to Individual Dignity

Section 3. No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or

religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations. Slavery and involuntary servitude are prohibited, except in the latter case as punishment for crime.

§ 4. Right to Property

Section 4. Every person has the right to acquire, own, control, use, enjoy, protect, and dispose of private property. This right is subject to reasonable statutory restrictions and the reasonable exercise of the police power.

Property shall not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation paid to the owner or into court for his benefit. Property shall not be taken or damaged by any private entity authorized by law to expropriate, except for a public and necessary purpose and with just compensation paid to the owner; in such proceedings, whether the purpose is public and necessary shall be a judicial question. In every expropriation, a party has the right to trial by jury to determine compensation, and the owner shall be compensated to the full extent of his loss. No business enterprise or any of its assets shall be taken for the purpose of operating that enterprise or halting competition with a government enterprise. However, a municipality may expropriate a utility within its jurisdiction. Personal effects, other than contraband, shall never be taken.

This Section shall not apply to appropriation of property necessary for levee and levee drainage purposes.

§ 5. Right to Privacy

Section 5. Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy. No warrant shall issue without probable cause supported by oath or affirmation, and particularly describing the place to be searched, the persons or things to be seized, and the lawful purpose or reason for the search. Any person adversely affected by a search or seizure conducted in violation of this Section shall have standing to raise its illegality in the appropriate court.

§ 6. Freedom from Intrusion

Section 6. No person shall be quartered in any house without the consent of the owner or lawful occupant.

§ 7. Freedom of Expression

Section 7. No law shall curtail or restrain the freedom of speech or of the press. Every person may speak, write, and publish his sentiments on any subject, but is responsible for abuse of that freedom.

§ 8. Freedom of Religion

Section 8. No law shall be enacted respecting an establishment of religion or prohibiting the free exercise thereof.

§ 9. Right of Assembly and Petition

Section 9. No law shall impair the right of any person to assemble peaceably or to petition government for a redress of grievances.

§ 10. Right to Vote

Section 10. Every citizen of the state, upon reaching eighteen years of age, shall have the right to register and vote, except that this right may be suspended while a person is interdicted and judicially declared mentally incompetent or is under an order of imprisonment for conviction of a felony.

§ 11. Right to Keep and Bear Arms

Section 11. The right of each citizen to keep and bear arms shall not be abridged, but this provision shall not prevent the passage of laws to prohibit the carrying of weapons concealed on the person.

§ 12. Freedom from Discrimination

Section 12. In access to public areas, accommodations, and facilities, every person shall be free from discrimination based on race, religion, or national ancestry and from arbitrary, capricious, or unreasonable discrimination based on age, sex, or physical condition.

§ 13. Rights of the Accused

Section 13. When any person has been arrested or detained in connection with the investigation or commission of any offense, he shall be advised fully of the reason for his arrest or detention, his right to remain silent, his right against self incrimination, his right

to the assistance of counsel and, if indigent, his right to court appointed counsel. In a criminal prosecution, an accused shall be informed of the nature and cause of the accusation against him. At each stage of the proceedings, every person is entitled to assistance of counsel of his choice, or appointed by the court if he is indigent and charged with an offense punishable by imprisonment. The legislature shall provide for a uniform system for securing and compensating qualified counsel for indigents.

§ 14. Right to Preliminary Examination

Section 14. The right to a preliminary examination shall not be denied in felony cases except when the accused is indicted by a grand jury.

§ 15. Initiation of Prosecution

Section 15. Prosecution of a felony shall be initiated by indictment or information, but no person shall be held to answer for a capital crime or a crime punishable by life imprisonment except on indictment by a grand jury. No person shall be twice placed in jeopardy for the same offense, except on his application for a new trial, when a mistrial is declared, or when a motion in arrest of judgment is sustained.

§ 16. Right to a Fair Trial

Section 16. Every person charged with a crime is presumed innocent until proven guilty and is entitled to a speedy, public, and impartial trial in the parish where the offense or an element of the offense occurred, unless venue is changed in accordance with law. No person shall be compelled to give evidence against himself. An accused is entitled to confront and cross-examine the witnesses against him, to compel the attendance of witnesses, to present a defense, and to testify in his own behalf.

§ 17. Jury Trial in Criminal Cases

Section 17. A criminal case in which the punishment may be capital shall be tried before a jury of twelve persons, all of whom must concur to render a verdict. A case in which the punishment is necessarily confinement at hard labor shall be tried before a jury of twelve persons, ten of whom must concur to render a verdict. A case in which the punishment may be confinement at hard labor or confinement without hard labor for more than six months shall be tried before a jury of six persons, five of whom must concur to render a verdict. The accused shall have a right to full voir dire ex-

amination of prospective jurors and to challenge jurors peremptorily. The number of challenges shall be fixed by law. Except in capital cases, a defendant may knowingly and intelligently waive his right to a trial by jury.

§ 18. Right to Bail

Section 18. Excessive bail shall not be required. Before and during a trial, a person shall be bailable by sufficient surety, except when he is charged with a capital offense and the proof is evident and the presumption of guilt is great. After conviction and before sentencing, a person shall be bailable if the maximum sentence which may be imposed is imprisonment for five years or less; and the judge may grant bail if the maximum sentence which may be imposed is imprisonment exceeding five years. After sentencing and until final judgment, a person shall be bailable if the sentence actually imposed is five years or less; and the judge may grant bail if the sentence actually imposed exceeds imprisonment for five years.

§ 19. Right to Judicial Review

Section 19. No person shall be subjected to imprisonment or forfeiture of rights or property without the right of judicial review based upon a complete record of all evidence upon which the judgment is based. This right may be intelligently waived. The cost of transcribing the record shall be paid as provided by law.

§ 20. Right to Humane Treatment

Section 20. No law shall subject any person to euthanasia, to torture, or to cruel, excessive, or unusual punishment. Full rights of citizenship shall be restored upon termination of state and federal supervision following conviction for any offense.

§ 21. Writ of Habeas Corpus

Section 21. The writ of habeas corpus shall not be suspended.

§ 22. Access to Courts

Section 22. All courts shall be open, and every person shall have an adequate remedy by due process of law and justice, administered without denial, partiality, or unreasonable delay, for injury to him in his person, property, reputation, or other rights.

§ 23. Prohibited Laws

Section 23. No bill of attainder, ex post facto law, or law impairing the obligation of contracts shall be enacted.

§ 24. Unenumerated Rights

Section 24. The enumeration in this constitution of certain rights shall not deny or disparage other rights retained by the individual citizens of the state.

APPENDIX "L"

The Supreme Court of the State of Louisiana

STATE OF LOUISIANA

VS. NO. 86-K - 0904

JERRY D. CARTER

IN RE: Carter, Jerry; Applying for Writ of Certiorari and/or Review, Stay, Prohibition and Mandamus; to the Court of Appeal, Third Circuit, Number CR85-669; Parish of LaSalle 28th Judicial District Court Number 30,658

September 8, 1986

Denied.

JLD

JAD

PFC

WFM

JCW

HTL

LFC

Supreme Court of Louisiana
September 8, 1986

Clerk of Court
For the Court

86-916

No. .... (2)

In The

Supreme Court of the United States

October Term, 1986

JERRY D. CARTER

vs.

STATE OF LOUISIANA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT STATE OF LOUISIANA

SUPPLEMENTAL APPENDIX

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On Behalf of Defendant,
Appellant Applicant
Jerry D. Carter

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/s/ Frans J. LeBranche, Jr.
Clerk of Court
For the Court

NO. Cr85-669
COURT OF APPEAL, THIRD CIRCUIT
STATE OF LOUISIANA

STATE OF LOUISIANA

VERSUS

JERRY CARTER

APPEAL FROM THE TWENTY-EIGHTH JUDICIAL DISTRICT COURT, PARISH OF LASALLE, STATE OF LOUISIANA, HONORABLE JIMMIE C. PETERS, DISTRICT JUDGE, PRESIDING.

(March 5, 1986)

BEFORE GUIDRY, LABORDE and KNOLL, JUDGES
GUIDRY, JUDGE

The defendant, Jerry Carter, was charged with possession of marijuana with intent to distribute, in violation of La. R.S. 40:964 Schedule I C(22), 40:966 A (1), and 40:966 B(2). At a hearing held on March 6, 1985, the trial court denied defendant's motion to suppress both evidence and statements obtained as a result of two (2) searches conducted on January 30, 1984. On March 11, 1985, the defendant changed his plea from not guilty to guilty reserving, however, his right to appeal the trial court's denial of his motion to suppress and was sentenced to three (3) years at hard labor with the Department of Corrections. Defendant appeals both the trial court's denial of the motion to suppress and the sentence imposed.

FACTS

On January 30, 1984, Gary Whatley, a probation officer, was making "routine visits" with some of the probationers and parolees to which he was assigned. While visiting with one of the probationers, the Tullos police chief arrived and advised Whatley that the defendant, one of Whatley's probationers, was growing and selling marijuana from his trailer. The police chief's information allegedly came from a "reliable informant". Whatley decided, after receiving the tip, that he would go and talk to the defendant about these allegations. When he reached the defendant's residence, he was informed by the defendant's ex-wife and then consort, Krista McClure, that the defendant was out, but would return later that evening. Ms. McClure allowed Whatley to enter the trailer where they spoke to one another in the living area for about 15 minutes while Whatley waited for defendant's return. After this brief conversation, according to Whatley, he then asked Ms. McClure if he could look around the trailer. According to Whatley, consent was given whereupon he observed a marijuana plant in the bedroom in plain view.

When Jerry Carter arrived, he was placed under arrest by Whatley for a probation violation and was later twice given his Miranda rights. In response to a call made by Whatley at the home of one of the defendant's neighbors, Officer Bobby Cruse arrived and was advised of the events that occurred that afternoon. Officer Cruse subsequently secured a search warrant for the defendant's trailer. The later search revealed more marijuana plants growing in the bedroom closet.

ASSIGNMENTS OF ERROR

1. Trial court erred in failing to grant defendant's motion to suppress.

2. Trial court erred in that the sentence was excessive and failed to meet the requirements of 894.1 of the Louisiana Code of Criminal Procedure.

ASSIGNMENT OF ERROR NO. 1

The defendant asserts that the fact of his probation status is of no consequence in regard to the constitutional rights he is to be afforded, arguing that both the Louisiana and United States Constitutions protect even probationers from unreasonable searches and seizures. U.S. Const. Amend. 4; La. Const. Art. 1 § 5.

The Louisiana Supreme Court has held that an individual on probation does not have the same freedom from governmental intrusion into his affairs as does the ordinary citizen, but has essentially the same status as a parolee, in that both have a reduced expectation of privacy. Albeit, a probationer or parolee is entitled to the protection afforded by The Fourth Amendment and La. Const. Art 1 Sec. 5 against unreasonable searches. State v. Malone, 403 So2d 1234 (La. 1981). The probationer or parolee's reduced expectation of privacy occurs as a result of his prior conviction and the circumstances of his agreement to allow continuing scrutiny of his activities while on parole or probation to assure that his conduct conforms with the conditions of his probation. Thus, our Supreme Court in State v. Patrick, 381 So2d 501 (La. 1980) recognized that warrantless searches of a parolee's person

and residence by a parole officer may be upheld as reasonable, although less than probable cause was shown.

In State v. Malone, supra, our Supreme Court, relying on Bell v. Wolfish, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979), concluded that a determination as to whether a particular search is reasonable must be considered in light of the total atmosphere in which it took place, i.e., (1) the scope of the particular intrusion; (2) the manner in which it was conducted; (3) the justification for initiating it; and, (4) the place in which it was conducted.

In *Malone,* supra at 1239, the court distinguished between a routine visit by a probation officer and a visit that was actually a subterfuge for criminal investigation. The facts in *Malone* indicate that the defendant's name was on the probation officer's routine visit list, and that the probation officer did not receive any tip from a police officer that defendant was in violation of his probation agreement. While approaching the probationer's house. the officer saw a hose running into the woods from the defendant's house. Upon investigation, without a warrant, the probation officer discovered a marijuana patch. Under these conditions, the court held that the warrantless search was reasonable.

Malone, supra, and the present case are distinguishable in that, in the instant case, Whatley was following a tip that the defendant was engaging in criminal activity. However, in this regard, there is no evidence that Whatley, in response to this tip, set out to conduct an immediate warrantless search of the defendant's trailer. Nor does the record reflect that the limited search conducted by Whatley was initiated at the suggestion of the police.

Rather, Whatley testified that his intention was to visit with the defendant and discuss allegations of criminal activity with him. Whatley's stated intention is corroborated by the fact that he did not conduct an immediate search of the Carter residence after he was allowed entry thereof by Ms. McClure. Although the visit by Whatley was not a routine visit, as was the case in *Malone,* supra, we do not consider that this circumstance dictates the conclusion that Whatley was conducting a criminal investigation. As acknowledged in *Malone,* supra, to further the purposes of probation it is a standard condition that the probationer allow the probation officer to visit his home at the option of the officer. In our view, Whatley, under the circumstances, had not only the right but the duty to visit and discuss this matter with defendant. However, we need not determine whether, under the "total atmosphere" of this case, Whatley's search was a subterfuge for criminal investigation or, if not, whether the circumstances present entitled him to conduct a warrantless search inside the Carter home, because the record reflects that valid consent was given for the limited search conducted.

Warrantless searches are valid if performed after a valid consent is given by someone who possesses common authority or other sufficient relationship to the premises or effects sought to be inspected. United States v. Matlock, 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974); State v. Bodley, 394 So2d 584 (La. 1981); State v. Cover, 450 So2d 741 (La. App. 5th Cir. 1984), writ denied, 456 So2d 166 (La. 1984).

The United States Supreme Court identified two bases for its "common authority" rule: (1) that the consent-

ing party could permit the search "in his own right"; and, (2) that the defendant had "assumed the risk" that a co-occupant might permit a search. United States v. Matlock, supra; State v. Price, 476 So2d 989 (La. App. 1st Cir. 1985).

Whether consent is voluntary is a fact question. The determination of the trial court on this issue must be given great weight on appeal. State v. Dunbar, 356 So2d 956 (La. 1978); State v. Temple, 343 So2d 1024 (La. 1977).

The facts in the instant case show that Ms. McClure, who was living in the trailer, invited Mr. Whatley into the trailer. They then spoke to each other for approximately 15 minutes in the living area. Mr. Whatley contends that he asked Ms. McClure if he could look about the trailer. She allegedly consented, accompanied Whatley on his search and even opened the door to the bedroom which contained the marijuana plant which was in plain view on the windowsill.

The defendant contends that Ms. McClure's consent was not valid because she was not told that she had a right to refuse the search. While the fact that a person was not warned of her right to refuse to consent to search is one factor to be considered, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent to search. State v. Bourgeois, 388 So2d 359 (La. 1980), appeal after remand, 406 So2d 550 (La. 1981); State v. Rogers, 324 So2d 403 (La. 1975).

After reviewing the record, we feel it is evident that the trial judge did not err in determining that the consent to search was freely and validly given by Ms. McClure,

and that she had the right to give said consent because she possessed common authority over the residence. *Matlock,* supra; *Dunbar,* supra; *Temple,* supra; State v. Watson, 477 So2d 788 (La. App. 5th Cir. 1985).

Thus, since the first search of the trailer by Whatley was valid the use of the information obtained as a result of that search in an affidavit as probable cause to issue a search warrant for the second search was also valid. State v. Bruno, 427 So2d 1174 (La. 1983).

In light of all of the foregoing, the defendant's contention that the trial court erred in failing to grant the motion to suppress lacks merit.

ASSIGNMENT OF ERROR NO. 2

The defendant asserts that the trial court erred in that the sentence was excessive and failed to meet the requirements of La. C.Cr.P. art. 894.1.

To assist the courts in imposing appropriate sentences, La. C.Cr.P. art. 894.1, which provides sentencing guidelines, was enacted. It sets forth three factors or aggravating circumstances weighing in favor of a sentence of imprisonment and eleven factors or mitigating circumstances weighing in favor of a probated or suspended sentence. In imposing a sentence which may appear to be severe, the sentencing judge must set out for the record specific reasons for the sentence imposed which are based on particular facts and considerations related to the defendant and his offense. State v. Morgan, 428 So2d 1215 (La. App. 3rd Cir. 1983), writ denied, 433 So2d 166 (La. 1983). However, the sentencing judge is not required to

articulate every factor provided in Article 894.1 so long as the record reflects that these factors were considered in particularizing the sentence to the defendant. State v. Morgan, supra. The statement of reasons is designed to aid the appellate court in the review of an alleged excessive sentence. State v. MacDonald, 390 So2d 1276 (La. 1980).

In sentencing the defendant, the trial judge found that all three factors weighing in favor of a sentence of imprisonment were present in this case. Where either one of parts A (1), (2), or (3) or La. C.Cr.P. art. 894.1 is applicable, the court has a legislative mandate to imprison a convicted felon. State v. Johnson, 474 So2d 36 (La. App. 3rd Cir. 1984); State v. Foley, 448 So2d 731 (La. App. 5th Cir. 1984). Furthermore, the sentencing transcript shows that the trial judge was aware of and considered the guidelines of La. C.Cr.P. art. 894.1. He took into account aggravating and mitigating factors, which is all that is required. State v. Brian, 467 So2d 878 (La. App. 3rd Cir. 1985).

Additionally, even if it is found that the trial judge failed to adequately consider or articulate the 894.1 guidelines in sentencing this defendant, where a sentence imposed is not apparently severe and is in the lower range of the sentencing scale, a court of appeal need not remand for compliance with Article 894.1. State v. Jones, 412 So2d 1051 (La. 1982); State v. Rainwater, 448 So2d 1387 (La. App. 3rd Cir. 1984). The record reveals that the trial judge ordered a pre-sentence investigation and report which was made part of the record. The report included a brief history of the defendant. The defendant is a twenty-four (24) year old Caucasian male who completed

high school and one year of college. This is his second felony conviction for possession of marijuana with intent to distribute. The incident giving rise to his second conviction occurred while he was on probation for his first conviction. The crime of possession of marijuana with intent to distribute is punishable by imprisonment at hard labor for not more than ten years and a fine of not more than than $15,000.00. Therefore, under the circumstances of this defendant's case, the three year sentence imposed is in the lower range of the sentencing scale and is not apparently severe.

Therefore, the defendant's contention that the sentence was excessive and failed to meet the requirements of La. C.Cr.P. art. 894.1 is without merit.

DECREE

For the above and foregoing reasons, the judgment of the trial court is affirmed.

AFFIRMED.

COURT OF APPEAL, THIRD CIRCUIT
STATE OF LOUISIANA

STATE OF LOUISIANA

v.

No. CR85-669

JERRY D. CARTER

BEFORE: JUDGES GUIDRY-LABORDE-KNOLL

ORDER

The Application......for Rehearing herein having been duly considered:

IT IS ORDERED that a Rehearing be, and the same is hereby, DENIED.

Lake Charles, Louisiana, this 9th day of APRIL, 1986.

/s/ E.L.G. Jr.
/s/ P.J.L. Jr.
/s/ J.I.K.
Judges

Filed April 9, 1986.
/s/ Kenneth J. DeBlanc/SAS
Clerk